No. 92-591

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN M. POINDEXTER, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In opposing review of this case, Poindexter does not take issue with any of the basic legal propositions advanced in the petition. Instead, he challenges our *description* of the holding below, arguing that the court of appeals did *not* hold 18 U.S.C. 1505 unconstitutional as applied to a wide range of obstructive conduct, did *not* bar the prosecution's use of most relevant circumstantial evidence in satisfying the requirements of *Kastigar*, and did *not* apply an extraordinarily expansive

substantive Fifth Amendment standard. These assertions, however, plainly cannot be squared with the language and analysis used by the court of appeals, as even the most cursory reading will confirm. That Poindexter has sought to obscure the scope of the decision below nevertheless is revealing; it amounts to a tacit acknowledgement of the expansive reach and mischievous force of its holding.

A. The Court of Appeals' Constitutional Vagueness Holding Warrants Review

In contending that the first question presented in the petition does not warrant review, Poindexter reads the opinion below to hold *as a matter of statutory construction* that Section 1505 does not reach lying to or misleading Congress, and he proceeds to defend the merits of that purported holding. Br. in Opp. 16, 25-30. If Poindexter were correct, that would hardly diminish the importance of the case or the appropriateness of review by this Court, for the construction of the statute hypothesized by Poindexter would place the D.C. Circuit in conflict with the many decisions that have applied Sections 1505 and 1503 in circumstances such as those here. See Pet. 12-14 & n.10. In fact, however, this attempt by Poindexter to divert attention from the remarkable constitutional analysis actually used by the court of appeals, while understandable as a tactical matter, is not sustainable.

The court of appeals simply did not rule that Section 1505 is *inapplicable* to Poindexter's conduct; instead, it held flatly and repeatedly held that "the term 'corruptly' is too vague to provide constitutionally adequate notice." Pet. App. 21a-22a. See, *e.g.*, *id.* at 2a ("the statute as written cannot constitutionally be applied"); *id.* at 21a (describing statute's "vagueness problem"); *id.* at 24a (looking for "narrowing interpretation" that would "put a reasonable person on notice that the statute applies"); *id.* at 39a ("the statute is unconstitutionally vague as applied to Poindexter's conduct"). As we demonstrate in the petition (at 11-12, 16-20), the

constitutional analysis used to reach that conclusion cannot be reconciled with the decisions of this and other courts. Equally as important, the holding below rests on an insupportably broad approach to the void-for-vagueness doctrine that will prove enormously destructive to a large body of legislation.

Although Poindexter does not take issue with our analysis of this Court's decisions, he does attempt to minimize the effect of the holding below by suggesting (Br. in Opp. 16-17, 25) that it precludes only those prosecutions under Section 1505 that are directed at persons who lied to or misled Congress (or administrative agencies, which also are protected by the statute).[1] In fact, the decision would be of considerable practical importance even if so limited, as is made clear by the innumerable past prosecutions for precisely such conduct under Section 1505 and under what Poindexter himself acknowledges (Br. in Opp. 29) to be the "analogous" proscription of 18 U.S.C. 1503 -- prosecutions that are cited at Pet. 12-14 & n.10 and that Poindexter makes no serious attempt to distinguish. But the holding below cannot, in any event, be so cabined. The court of appeals described "subornation" (and perhaps not even all forms of that) as "the

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[1] Actually, Poindexter argues that "it would be premature in this case to address the application of section 1505 to unadorned allegations of outright lying to Congress" because, he asserts, "[t]he indictment seeks Admiral Poindexter's conviction even for true statements." Br. in Opp. 29. This attempt to narrow the holding is untenable. The court of appeals flatly and repeatedly held that Section 1505 could not constitutionally be applied to "lying to the Congress." Pet. App. 19a. See *id.* at 22a ("lying to the Congress"), 24a ("lying"), 39a ("false and misleading statements"). As for the indictment, both Count 2 and Count 3 charged Poindexter with making statements that were misleading *and* false (see J.A. 208-215); at a minimum, the jury charge as to Count 3 explained that Poindexter was accused of making "false[]" statements. J.A. 2181.

'core' behavior to which the statute may constitutionally be applied." Pet. App. 37a. See *id.* at 38a-39a. That analysis, which Poindexter simply ignores, would preclude prosecution of most common forms of obstructive behavior.

Poindexter offers no reason to doubt the prediction that the broad language of the decision below -- which opines "that, on its face, the word 'corruptly' is vague" (Pet. App. 20a; see *id.* at 21a-22a) -- both will bar the prosecution of criminally obstructive behavior and will prompt challenges to the constitutionality of many other statutes. In fact, the court of appeals' holding already has had precisely those effects; supporting the petition, the Independent Counsel charged with investigating the administration of the Department of Housing and Urban Development has informed the Court that the decision below has forced him (and will force him in the future) to forgo charging certain defendants who have engaged in criminal conduct. I.C. Br. 3-4. He also notes (at I.C. Br. 4-5) that, as a consequence of the holding in this case, he is now embroiled in litigation concerning the constitutionality of Section 1503.

Finally, Poindexter's contention (at Br. in Opp. 25-26, 30) that the holding below does not leave a significant gap in the criminal law is premised on his unduly narrow reading of the court of appeals' decision -- and is, in any event, again belied by the experience of the HUD Independent Counsel. See I.C. Br. 4. And more fundamentally, it is not the place of a criminal defendant (or of a court of appeals) to choose the provisions under which a prosecution will proceed. Here, the court below held a useful and oft-invoked federal statute unconstitutional in many of its most important applications; almost by definition, that decision warrants this Court's attention.

B. The Court of Appeals' Procedural Holding Under *Kastigar* Warrants Review

The petition's second question seeks review of the holding below that the government may not carry its *Kastigar* burden by pointing either to persuasive evidence that a witness was lying when he denied having an untainted recollection of events or to other circumstantial indicia establishing that the trial testimony had not been affected by the witness's exposure to the defendant's immunized testimony. See Pet. 21-26. Poindexter does not take issue with our submission that such a holding would merit review by this Court. Instead, he asserts that we have mischaracterized the decision below, arguing that the petition "attacks a purported procedural ruling that the court manifestly did not make" (Br. in Opp. 16); in particular, he denies both that the district court found North to be lying when he denied having an untainted memory and that the court of appeals held that finding legally irrelevant (*id.* at 21-22). Although Poindexter's current interest in denying the dramatic scope of the holding below is easy to understand, he is wrong on both counts.

1. Poindexter takes issue with our statement that the district court found North to be lying when he denied having an untainted recollection of events; Poindexter asserts that "[t]here was no such finding" (Br. in Opp. 21), that the court in fact found North's recollection to be *tainted* and "steadfastly adhered to that ruling" (*id.* at 22), and that "[t]he court simply permitted North to testify against Poindexter notwithstanding" (*ibid.*). Those assertions are demonstrably incorrect. It is true, as we noted in the petition (at 6), that the district court initially ruled that North would be permitted

to give only limited testimony. See Pet. App. 164a.[2] But the court subsequently held that, at the *Kastigar* hearing, North was "prevaricating on * * * whether he had to rely for his recollection of events on Poindexter's immunized testimony" (*id.* at 133a); after trial, the court reaffirmed that it "found as a fact that North's * * * claim * * * was totally incredible" (*id.* at 83a (footnote omitted)) and concluded that North was "not telling the truth" (*id.* at 85a). It is difficult to imagine how the district court could have stated its finding in clearer terms.[3]

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[2] At no time, however, did the court intimate that it believed North, as Poindexter evidently means to suggest. See Br. in Opp. 22. To the contrary, even as it limited North's testimony the court declared that it was "skeptical" about North's statements (Pet App. 164a), had "doubts concerning [North's] credibility" (*ibid.*), found his account "dubious" (*id.* at 165a n.34), and would in fact have "reject[ed] North's assertions as entirely unbelievable" were "the issue one of lesser gravity." *Id.* at 165a.

[3] Poindexter claims that the district court even after trial continued to "'accept[] as a general proposition North's assertion of an inability to distinguish between his own conversations [*sic*] and the version of events described in defendant's immunized testimony.'" Br. in Opp. 22, quoting Pet. App. 83a-84a n.40. This quotation is, to put it charitably, incomplete. After making the observation quoted by Poindexter the district court immediately went on to state that its willingness to accept North's account had been based "on the theory that [the court] would not otherwise be able to find an independent basis of knowledge. 727 F. Supp. at 1500. *However, with respect to the particular issue under consideration here, North has provided the Court with such independent evidence by way of his own trial testimony [that is, testimony at North's own trial].*" Pet. App. 84a n.40 (emphasis added). And while Poindexter suggests that the district court never found North's memory to have been unaffected by exposure to Poindexter's immunized testimony, the court in fact found it

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Poindexter is equally incorrect in denying that the court of appeals held the district judge's finding to be legally irrelevant. In fact, the court of appeals expressly noted the "trial court's finding that North, out of loyalty to Poindexter, lied when he asserted that he was unable to segregate his own recollection from the effects of his exposure." Pet. App. 15a. But the court of appeals nevertheless held that the finding could not be used to establish that North *was able* to segregate his own recollection, explaining: "More to the point, even if North's assertion [of taint] were to be given no weight, the [Independent Counsel] would still have failed to meet his burden, which is to demonstrate that the immunized testimony did *not* influence the witness." *Ibid.* (emphasis in original). We explained in the petition (at 23-24) that this holding is inconsistent with decisions of this and other courts. Poindexter fails even to attempt to distinguish those decisions.[4]

2. Poindexter asserts that "the court of appeals imposed no 'procedural requirement'" precluding the government's use of circumstantial evidence to establish lack of taint where

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[3] (...continued)
"inherently incredible that, as he claimed at the *Kastigar* hearing, North did not remember" the destruction of the Presidential Finding. *Id.* at 84a.

[4] Poindexter argues that the district court's factual finding was incorrect. Br. in Opp. 22-23 n.2. That argument is beside the point here; as we have explained, the court of appeals noted the finding and held it *legally irrelevant*. It is worth noting, however, that Poindexter's factual submission is wrong. Poindexter simply ignores the most probative evidence considered by the district court: had North's testimony at the *Kastigar* hearing been true, the conversations concerning the destruction of the Presidential Finding that he vividly described at his own trial *could not have taken place*. See Pet. 25 n.18. That the court of appeals deemed such evidence irrelevant demonstrates the patent illogic of its rule.

"canned" testimony is unavailable (Br. in Opp. 20); he points to the court's boilerplate statement that it did not "'mean to preclude the use of any techniques of which we [are] not aware' and by which the prosecution might be able to carry its burden." Pet. App. 15a-16a, quoting *North II*, 920 F.2d at 943. But we demonstrate in the petition (at 22-26) -- and Poindexter nowhere denies -- that the court of appeals held legally irrelevant both the government's proof that North's statements were "inherently incredible" (Pet. App. 84a) and its evidence that North's trial testimony differed in significant respects from Poindexter's immunized disclosures (which established the existence and extent of North's independent recollection of the events to which he testified). The court's holding thus essentially covered the waterfront in precluding the use of circumstantial evidence.

C. The Court of Appeals' Substantive Fifth Amendment Holding Warrants Review

In arguing that the court of appeals' substantive Fifth Amendment ruling does not warrant review, Poindexter asserts that the petition misstates the holding below when it reports that the decision "stands for the rule that '"the government must demonstrate affirmatively that the immunized testimony did not ... [have] an influence on [the trial witnesses'] thinking, even one for which they cannot at this time consciously account."'" Br. in Opp. 19, quoting Pet. App. 10a. Poindexter contends that this passage from the decision below simply repeats the district court's characterization of Poindexter's own position and that the court of appeals "did not mean to endorse or adopt that [characterization] as its own position." Br. in Opp. 19.

Again, Poindexter is incorrect. In fact, the court of appeals explained that Poindexter's understanding of *Kastigar*'s requirements was "not unlike the one we later applied in *North*" (Pet. App. 9a); it cited the district court's rejection of Poindexter's position as evidence that the trial

judge applied "a conception of 'use' much narrower than ours in *North*." *Id.* at 10a. Indeed, it is difficult to see why Poindexter resists our description of the decision below, which is no different in substance from his own repeated assertion that impermissible taint occurs if exposure to immunized testimony leads a witness to "remember[], understand], or appreciate[]" events differently. Br. in Opp. 9.

In any event, we explain in the petition (at 26-28) that the standard spelled out both in the decision below and in *North* cannot be reconciled with this Court's application of attenuation concepts under the Fourth and Fifth Amendments. Poindexter labels this Court's decisions "inapposite" but gives no explanation as to why that is so. Br. in Opp. 18. Instead, he makes the factual contention that attenuation notions are not applicable here because, he asserts, tainted evidence was placed before the jury. See *id.* at 18, 19-20. That contention is incorrect on its own terms.[5] But more important, it also

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[5] As evidence that immunized testimony was placed before the jury, Poindexter asserts that prosecutors studied North's testimony at his own trial and forced North to repeat that testimony at Poindexter's trial (Br.in Opp. 18); Poindexter fails to note the district court's finding that North's testimony at his own trial was untainted. Poindexter's assertion that "if ever there was a witness affected by immunized disclosures, North was that witness" (*id.* at 20), similarly ignores the district court's finding that North had an untainted memory of events. And Poindexter's statement that Rep. Hamilton, a government witness, "was permitted to testify that he had heard Poindexter admit [before Congress] destroying the Finding" (*id.* at 12; see *id.* at 20) is meritless. In fact, when Rep. Hamilton stated during direct examination that Poindexter had acknowledged destroying the finding (a statement that evidently referred to Poindexter's immunized testimony), the district judge immediately cut off questioning; he subsequently found that the statement had been "harmless beyond a reasonable doubt" (J.A. 1071) because "Hamilton's fleeting testimony imparted no

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is beside the point. The court of appeals, which announced an absolutist approach that leaves no room for attenuation, applied the wrong standard; Poindexter's factual arguments are appropriately made on remand after this Court corrects the court of appeals' error.

Poindexter also contends that review is not warranted because prosecutions like this one "are truly *sui generis*." Br. in Opp. 24. We agree, of course, that cases involving nationally televised immunized testimony are rare (although the rules governing in such circumstances are important because those cases invariably are of the greatest public importance). But as we explain in the petition (at 28-29 & n.20), and as Poindexter cannot deny, there have been any number of prosecutions of persons whose immunized testimony was widely disseminated among the interested parties -- prosecutions in which issues identical to those here might arise. Pointing to the dismissal of the indictment in *North*, Poindexter also asserts that "this case is over" as a practical matter because it will be impossible for the government to show on remand that the indictment is untainted. Br. in Opp. 24-25. Again, Poindexter is wrong. The North indictment was dismissed because it would have been very difficult, under the court of appeals' standard, to demonstrate that the *trial* in that case was untainted by *North's* immunized testimony. Nothing in that dismissal suggests that the government could not prevail on a remand in showing that the *indictment* was untainted by *Poindexter's* testimony.

For the foregoing reasons and the reasons presented in the petition, the petition for a writ of certiorari should be granted.

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[5] (...continued)
substantial information not already before the jury." J.A. 2247 (footnote omitted). This ruling plainly was correct and was not disturbed by the court of appeals.

Respectfully submitted.

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